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In the Supreme Court of the United States

October Term, 1975

No. 75-424

AUDREY JEFFERSON,
Petitioner

vs.

COMMONWEALTH OF PENNSYLVANIA,
Respondent

ANSWER TO PETITION FOR WRIT OF CERTIORARI

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ANSWER TO PETITION FOR WRIT OF CERTIORARI

The Commonwealth of Pennsylvania, by and through Robert L. VanHoove, Esquire, District Attorney, Berks County Pennsylvania, and Grant E. Wesner, Esquire, Deputy District Attorney for Law, Berks County, Pennsylvania, prays that the petition for writ of certiorari presented by the Defendant, Audrey Jefferson, to No. 75-424 October Term, 1975, Supreme Court of the United States, be disallowed, said prayer being directed to the refusal to set aside the judgment in this matter by the Supreme Court of the Commonwealth of Pennsylvania dated June 20, 1975. The opinion thereof appears in the petition of Audrey Jefferson at page A-7.

CITATIONS OF OPINIONS BELOW

Appearing in the defendant Audrey Jefferson's petition to No. 75-424, October Term, 1975, Supreme Court of the United States, at page A-7, is the order of June 20, 1975 of the Supreme Court of Pennsylvania, denying leave of the defendant to appeal the decision of the Superior Court of Pennsylvania dated April 22, 1975.

Appearing at page A-5 of the defendant Audrey Jefferson's petition for writ of certiorari to the above referred to number of this Honorable Court, is the opinion denying the defendant leave from the judgment of sentence of the Court of Common Pleas of Berks County, Pennsylvania, Criminal Division, said memorandum opinion being dated February 6, 1975, and appears at page A-1 of the said petition.

COUNTER-HISTORY OF THE CASE

The Commonwealth of Pennsylvania accepts the history of the case as the same appears in the statement of the case at page 4 of the petition for writ of certiorari presented to your Honorable Court to No. 75-424 October Term, 1975, so far as it goes.

By way of further and more explicit history, the Commonwealth calls to this Honorable Court's attention the following:

Defendant was tried by a jury before the Honorable W. Richard Eshelman, and convicted of solicitation to commit sodomy and prostitution on March 17, 1970, on the testimony of Donald Holloway and Francis T. Golden of the Troop L Vice Squad of the Pennsylvania State Police. The prosecuting officer was Sgt. Donald Holloway and the main testimony of Trooper Francis T. Golden, in essence, was that on March 27, 1969, at approximately 5:00 p.m. while in the Terminal Hotel located at 7th and Franklin Streets in the City of Reading, Berks County, Pennsylvania, the defendant, Audrey Jefferson, asked Trooper Golden, "Do you want to go out?"

Trooper Golden explained to her that he was leaving and was going to get something to eat and drink, and that he would probably come back to the Terminal Hotel later on. The defendant then said, "Do you want to go out with me now?" and Troop-

er Golden said, "Where do you mean going out?" and the defendant said, "Well, to my apartment."

The defendant then explained that her mother was watching her children and that they could go to her apartment. She asked if Trooper Golden could spend $20.00, and Trooper Golden said, "For what?". The defendant then replied, "For a half-and-half", and thereafter, the defendant was asked what she would do for this sum of money. The defendant said, "I will suck and fuck you", and then the Trooper said, "Well, what do you do first?" Defendant then said, "Whatever you want to do." Thereafter the conversation pertained to obtaining the defendant's telephone number, which was placed on a matchbook cover (N.T. 6 and 7).

After the Commonwealth presented its case and rested, the defendant demurred to the evidence on all three charges. The trial judge disallowed the demurrer as to solicitation to commit sodomy and prostitution, but sustained the demurrer as to assignation (N.T. 20 and 21).

Defendant did not take the witness stand, but two witnesses testified on her behalf. The case was handed to the jury and the jury returned a verdict of guilty on both counts. Thereafter, the defendant filed motions for new trial and in arrest of judgment.

REASONS FOR DENYING THE PRAYER OF THE PETITION FOR WRIT OF CERTIORARI

1. The petitioner-defendant was denied properly the right, in the appeal to the Superior Court of Pennsylvania, to raise the issue of whether or not the conduct of the defendant fell within the language of the statutory definition of solicitation to commit sodomy because the issue had never been raised in the court below nor assigned as error at that time.

2. There is no real issue of a denial of equal protection of the law to women, by the failure of the New Muncy Act to provide for the imposition of a minimum sentence, which cannot be properly corrected by either the allowance of the probation and parole authorities to impose what is, in essence, a minimum by way of administrative regulation or, in the last extremity, to remand for reconsideration of sentence imposing both a maximum and a minimum.

The last suggestion would be a fair and practical solution since under other statutes in the Commonwealth of Pennsylvania the minimum may not exceed more than half of the maximum. On the other hand, the formula used for early release at Muncy as it appears in the record of the within case and argument indicates that such term never exceeds nor, in fact, approaches the half of the maximum.

Reasons for Denying Petition

3. The appellate courts of Pennsylvania properly imposed the condition that no appeal matters may be raised for the first time in the appellate court. Any attempt to alter this basic rule would end in utter appellate chaos.

ARGUMENT

I. Was There Sufficient Evidence Presented by the Commonwealth To Enable the Jury To Find the Defendant Guilty of Solicitation To Commit Sodomy and Prostitution?

As is pointed out in the petition for writ of certiorari presented by Audrey Jefferson on page A-5 of the appendix, the Superior Court of Pennsylvania, considering this case, declined to consider the issue of whether or not her conduct, as testified to by the officer, fell within the language of the statutory definition of solicitation to commit sodomy pursuant to the Act in force; i.e., the Act of June 24, 1939, P. L. 874, Sec. 502, 18 P.S. Sec. 4502 (which Act was subsequently repealed and is now covered by Sections 902, 905(a), 3123 and 3124 of the New Pennsylvania Crimes Code). As that Honorable Court finds, that contention was not raised in the court below and the appellant cannot raise that matter in the first instance at the appellate level. See *Commonwealth v. Clair,* 458 Pa. 418, 326 A. 2d 272 (1974), and *Commonwealth v. Agie,* 449 Pa. 187, 296 A. 2d 741 (1972).

By way of further argument, let us assume arguendo that there was no failure to raise the issue in proper fashion. The petitioner is alleging that an

overt act must be demonstrated or something must be done to incite the one approached with the illicit importuning. The Commonwealth submits that the Act is simply written and clearly laid out. Its purpose is to guard against assaults upon another with the intent to commit sodomy as well as the initial solicitation to commit sodomy. Is the prohibition of such activity, even at the solicitation level, a proper exercise of the sovereign police power of the Commonwealth of Pennsylvania? The Commonwealth contends that the Act, as written, if considered, would constitute a proper exercise of legislative function.

Solicitation means to importune to ask for something and the record in the instant case, Commonwealth respectfully submits, clearly demonstrates that. The defendant used the words "blow" and "trick", specifically thereby referring to the basis for the charge of a solicitation to commit sodomy.

It was suggested below that these words resulted in a merger which proposition was answered below and not raised here and will be considered no further.

The Commonwealth is, therefore, of the opinion that the defendant was properly convicted pursuant to 18 P.S. 4502 and such belief by the Commonwealth is made in spite of the dissenting opinion filed in the case of *Commonwealth v. Joan Piper,* 221 Pa. Superior Ct. 187, 289 A. 2d 193 (1972), 458 Pa. 307, 328 A. 2d 841 (1974).

Argument

II. Was the Lower Court's Sentence Applicable in View of the Mandate Imposing No Minimum Sentence?

In the second proposition presented in the petition for writ of certiorari, the appellant raises a procedural rather than a substantive matter; i.e., she argues that the Act under which she was sentenced, in fact, deprived her of equal protection of the law as is guaranteed by virtue of the Fourteenth Amendment of the Constitution of the United States because it does not allow the sentencing court to impose other than a maximum sentence of females pursuant to the Muncy Act, the Act of July 16, 1968, P. L. 349, Sec. 1, 61 P.S. Sec. 566. The Supreme Court of Pennsylvania has addressed itself to this problem in *Commonwealth v. Butler*, 458, Pa. 289, 328 A. 2d 851, 858 (1974). Again, the matter was not raised prior to the appellate level. For authority that it cannot be there raised, see *Commonwealth v. Clair*, supra, and *Commonwealth v. Agie*, supra.

In broadest aspect, the Commonwealth of Pennsylvania would not resist a return of the matter for resentencing to impose a minimum sentence in this case but views that as a vain act. It is customary and it is permissible in this Commonwealth to impose a minimum sentence not greater than one-half of the maximum. In the instant case, even without a minimum, it is the internal procedural arrangement of the Parole and Probation Board of the

Commonwealth of Pennsylvania to consider early release for women committed to Muncy under the above-named Act. This is, in essence, the equivalent of a minimum sentence and would be substantially less than one-half.

There was, however, as pointed out in the per curiam opinion of the Superior Court of Pennsylvania as referred to above, a waiver.

III. Was the Decision of the Supreme Court of Pennsylvania and the Superior Court of Pennsylvania, in Applying the Waiver Rule and in Denying the Right To Have Matters Not Raised Below Considered on Appeal in the First Instance, Legally Correct?

The third proposition raised by the petitioner refers to the case of *Commonwealth v. Piper,* 221 Pa. Superior Ct. 187, 289 A. 2d 193 (1972), a copy of which opinion, the dissent thereto and the consideration of the matter by the Supreme Court of Pennsylvania, Eastern District, appears on page A-17 of the petition. The court below clearly reviewed the matter of the *Piper* situation which is admittedly similar. Both opinions are dissenting opinions and the conclusion reached by the Superior and Supreme Courts of Pennsylvania in the instance case is in keeping with the majority of opinions in *Commonwealth v. Piper,* supra.

CONCLUSION

The Commonwealth is of the opinion that the petition for writ of certiorari should be dismissed and the defendant should be directed to present herself for sentence before the Court of Common Pleas of Berks County, Pennsylvania, Criminal Division.

Respectfully submitted,

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Attorneys for Respondent.